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Supreme Court of the United States

October Term

JERSEY CENTRAL
POWER & LIGHT COMPANY — Plaintiff-Respondent

vs.

TOWNSHIP OF LACEY, an incorporated village
located in Ocean County, New Jersey — Defendant-Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. _____

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POWER & LIGHT COMPANY Plaintiff-Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Township of Lacey, respectfully requests that a writ of certiorari issue to the United States Court of Appeals for Third Circuit to review the judgment and opinion entered on September 6, 1985.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does the Township of Lacey have the power, as a matter of municipal land use control, to prohibit, by ordinance, the storage of imported nuclear fuel waste within Lacey Township?

2. Is the Township's ordinance, prohibiting the storage of nuclear fuel waste within its borders, preempted by the Atomic Energy Act, 42 U.S.C. §2011 *et seq*?

3. Is the Township's ordinance, prohibiting the importation of nuclear fuel for storage within its borders, preempted by the Hazardous Materials Transportation Act, 49 U.S.C. §1801 *et seq.*?

4. Is the Township's ordinance, prohibiting the use of private property as storage for imported nuclear waste, violative of the Commerce Clause of the U.S. Constitution?

5. In the event of a reversal on writ of certiorari, may the Township assess a penalty against Jersey Central Power & Light Company in accordance with its enforcement ordinance as if the same had never been erroneously declared unconstitutional?

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CITATION OF REPORTED OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is cited as *Jersey Central Power & Light Company v. Township of Lacey,* 772 F. 2d 1103 (3d Cir. 1985). The opinion of the United States District Court for the District of New Jersey is not reported and unpublished.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The United States District Court for the District of New Jersey entered judgment declaring Lacey Township's ordinance unconstitutional on September 24, 1984.

The United States Court of Appeals for the Third Circuit affirmed the judgment of the district court by written opinion and judgment dated September 6, 1985.

Jurisdiction for United States Supreme Court discretionary review of the judgment of the court below by writ of certiorari is invoked pursuant to 28 U.S.C. §1254(1) and Supreme Court Rule 17.1(c). The United States Court of Appeals for the Third Circuit had appellate jurisdiction pursuant to 28 U.S.C. §1291, in that the appeal was taken from a final judgment of a U.S. District Court. The United States District Court for the District of New Jersey had jurisdiction to hear the case pursuant to 28 U.S.C. §1331(a) and §1337, in that the plaintiff's original claim for declaratory judgment arose under the Article VI Section 2, as well as the Atomic Energy Act, 42 U.S.C. §2011 *et seq.*, and the Hazardous Materials Transportation Act., 49 U.S.C. §1801 *et seq.*

ORDINANCE SUBJECT TO REVIEW

ORDINANCE 24-83

AN ORDINANCE OF THE TOWNSHIP OF LACEY, COUNTY OF OCEAN, STATE OF NEW JERSEY, PROHIBITING THE IMPORTATION OF SPENT NUCLEAR FUEL OR RADIOACTIVE WASTE FOR STORAGE WITHIN THE TOWNSHIP OF LACEY, AND REGULATING THE STORAGE OF SPENT NUCLEAR FUEL AND OR RADIOACTIVE WASTE AT THE OYSTER CREEK NUCLEAR POWER PLANT WITHIN THE TOWNSHIP OF LACEY.

BE IT ORDAINED by the Township Committee of the Township of Lacey, County of Ocean, State of New Jersey, as follows:

SECTION 1. No persons shall import, transport or bring into the Township of Lacey any spent nuclear fuel or other radioactive waste for the purpose of storing the same within the Township of Lacey.

SECTION 2. No spent nuclear fuel or other radioactive waste, other than that generated at the Oyster Creek Nuclear Power Plant located within the Township of Lacey, shall be held for storage within the Township of Lacey. In regard to the Oyster Creek Nuclear Power Plant, no spent nuclear fuel or radioactive waste produced by that plant, which has been removed from the Township of Lacey, shall be brought back into the Township of Lacey for the purpose of storing the same on a temporary or permanent basis.

SECTION 3. Nothing in this ordinance shall be construed to prohibit the transportation of spent nuclear fuel or radioactive waste through the Township of Lacey as authorized and sanctioned by the Federal Government and State of New Jersey.

SECTION 4. All ordinances or parts of ordinances inconsistent herewith are hereby repealed.

SECTION 5. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by a Court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

SECTION 6. This ordinance shall take effect after second reading and publication as required by law.

ORDINANCE 56-84

AN ORDINANCE OF THE TOWNSHIP OF LACEY, COUNTY OF OCEAN, STATE OF NEW JERSEY, AMENDING AND SUPPLEMENTING CHAPTER 85 OF THE TOWNSHIP CODE OF THE TOWNSHIP OF LACEY, ENTITLED "RADIOACTIVE WASTE," SO AS TO PROVIDE FOR PENALTIES PROVISIONS FOR THE VIOLATION THEREOF

BE IT ORDAINED by the Township Committee of the Township of Lacey, County of Ocean, State of New Jersey, as follows:

SECTION 1. Chapter 85 of the Township Code of the Township of Lacey, entitled "Radioactive Waste," is hereby amended and supplemented as follows:

85-4. Violations and penalties.

Any person violating any of the provisions of this article shall, upon conviction, be punishable by a fine not exceeding one thousand dollars ($1,000.) or by imprisonment not exceeding ninety (90) days, or both.

SECTION 2. All ordinances or parts of ordinances inconsistent herewith are hereby repealed.

SECTION 3. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by a Court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

SECTION 4. This ordinance shall take effect after second reading and publication as required by law.

STATEMENT OF THE CASE

This case arises out of a dispute between the plaintiff-respondent, Jersey Central Power & Light Company (JCP&L), and the defendant-petitioner, Township of Lacey (Township), concerning the disposition of a certain 224 spent nuclear fuel rods which were located outside of the Township at the time this litigation was instituted. The subject fuel rods were generated at the JCP&L's Oyster Creek nuclear facility in Lacey Township and were brought by JCP&L to a nuclear fuel reprocessing center in West Valley, New York. The New York facility has since closed operation, and JCP&L wished to return the spent nuclear fuel rods to Oyster Creek. The Township, however, passed an ordinance prohibiting the importation of spent nuclear fuel into the Township for storage, and subsequently an amendatory ordinance providing penalties for the violation of the original ordinance. These ordinances have been attacked upon various constitutional grounds.

JCP&L asserted that the Oyster Creek facility in the Township is the only viable facility available for the storage of the subject 224 spent fuel rods. This claim, however, lacks factual substantiation and has been disputed by the Township during summary judgment proceedings. The Township believes that alternatives do, indeed, exist. Possibilities which the Township is aware of include: the Morris Plant in Morris, Illinois; the Savannah River Plant in Savannah, Georgia; the Virginia Electric Dam Company; Three Mile Island's closed facilities; contracts with other operating nuclear plants; and federal storage facilities. The District Court's entry of summary judgment precluded discovery and further investigation as to these and other alternatives.

Other factors need to be brought to the Court's attention. The Township was originally pursuaded to permit JCP&L to erect a nuclear power facility within its borders upon the assurances of JCP&L and federal government officials that nuclear waste disposal facilities would be provided off-site. Due to circumstances beyond the Township's control, however, no governmental or private agency has assumed the responsibility for nuclear waste disposal, and the Township is now being asked to permit lands within its borders to become a nuclear dumping ground for radioactive waste located outside its borders. Oyster Creek has only limited storage space, and eventually there will be more

nuclear waste than the facility can handle. Accepting the subject 224 spent fuel rods will only accelerate the practical and operational crisis which will occur in the near future when the JCP&L continues to produce nuclear waste without any storage or disposal facilities on-site (or elsewhere). Regardless of the effect upon its operations, however, JCP&L is at least part-owner of other nuclear facilities, and, since it is the nuclear operator's responsibility (not the local community's responsibility) to provide for and/or pay the cost of nuclear waste storage, JCP&L, and not the Township, should be required to find alternatives to Oyster Creek storage. The Township, on the other hand, has a responsibility and duty to protect and promote the health, safety, environment, economics and general welfare of its citizens. To ignore the legitimate concerns of its constituency would be a breach of the public trust to which the municipal governing body has accepted responsibility.

On August 25, 1983, the Township passed the ordinance under attack, which provides in pertinent part:

> "SECTION 1. No persons shall import, transport or bring into the Township of Lacey any spent nuclear fuel or other radioactive waste for the purpose of storing the same within the Township of Lacey.
>
> SECTION 2. No spent nuclear fuel or other radioactive waste, other than that generated at the Oyster Creek Nuclear Power Plant located within the Township of Lacey, shall be held for storage within the Township of Lacey. In regard to the Oyster Creek Nuclear Power Plant, no spent nuclear fuel or radioactive waste produced by that plant, which has been removed from the Township of Lacey, shall be brought back into the Township of Lacey for the purpose of storing the same on a temporary or permanent basis.
>
> SECTION 3. Nothing in this ordinance shall be construed to prohibit the transportation of spent nuclear fuel or radioactive waste through the Township of Lacey as authorized and sanctioned by the Federal Government and State of New Jersey."

This ordinance was amended on October 25, 1984 to provide

certain penalties for its violation, i.e., by a fine not exceeding one thousand dollars ($1,000) or by imprisonment not exceeding ninety (90) days, or both. This litigation followed.

JCP&L's complaint against the Township asserted federal jurisdiction pursuant to 28 U.S.C. §1331(a) and §1337, in that the plaintiff's original claim for declaratory judgment arose under the United States Constitution Article I, Section 8 and Article VI Section 2, as well as the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, and the Hazardous Materials Transportation Act, 49 U.S.C. §1801 *et seq.* The Township, however, contends that its inherent land use authority permits it to prevent the importation of nuclear waste into the municipality for long-term storage and/or disposal.

The Third Circuit Court affirmed the granting of summary judgment in favor of JCP&L by New Jersey's U.S. District Court, holding that (a) no genuine issues of material fact were in dispute; (b) the ordinance are preempted by the Atomic Energy Act and, thus, violative of the Supremacy Clause of the U.S. Constitution; and (c) the ordinances are preempted by the Hazardous Materials Transportation Act and, thus, also violative of the Constitution's Supremacy Clause. It is this holding which the Township of Lacey respectfully requests be reviewed by the U.S. Supreme Court upon writ of certiorari due to the extreme importance and wide-ranging ramifications of the Third Circuit's decision upon the nuclear power industry.

ARGUMENT

POINT I

CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE AN IMPORTANT ISSUE OF FEDERAL LAW APPLICABLE TO THE NUCLEAR INDUSTRY HAS NOT BEEN ADDRESSED BY THIS COURT AND HAS BEEN DECIDED BY THE COURT BELOW IN CONFLICT WITH THE DECISIONS OF THIS COURT IN SIMILAR CASES.

The within petition for writ of certiorari seeks the discretionary review of the United States Supreme Court pursuant to Supreme Court Rule 17.1(c), which permits such review where a federal court of appeals has decided on important questions of federal law which should be settled by this Court or has decided a federal question in conflict with the applicable decisions of this Court.

The issues being presented have nationwide importance and significance in the highly sensitive areas of nuclear power and nuclear waste. The short and long term storage of spent nuclear fuel is saturated with the public interest, as well as with considerations of national security. The country is in need of direction from this Court concerning the levels of permissible involvement of government at the state and local levels in confronting the national problem created by the accumulation of spent nuclear fuel without adequate provision for its storage and/or disposal. Congress has preliminarily addressed these issues in the Nuclear Waste Policy Act, 42 U.S.C. § 10101 *et seq.*, however, this Court has yet to rule upon the proper division of federal and state authority and responsibility to address the problem. To the extent that this Court has ruled upon the proper division at other stages of the nuclear energy issue, *see, Pac. Gas. & Elec. v. St. Energy Resources Conserv.*, 461 U.S. 190, 103 S. Ct. 1713 (1983), it is respectfully submitted that the decisions of the courts below have failed to give effect to the legal precedents of this Court.

A. The importance of the nuclear waste issues involved in this case affects all citizens of this country, especially at the local level.

The issues involved in this case concern the proper division of federal and local governmental authority to affect the storage and disposal of nuclear waste created at private nuclear power plants. At the present time, it is widely recognized that the lack of proper storage and disposal facilities has created a national crisis. In enacting the Nuclear Waste Policy Act of 1982, Congress set forth its legislative findings of fact that "a national problem has been created" by the accumulation of spent nuclear fuel from private nuclear power reactors, 42 U.S.C. §10131(a)(2), that federal efforts to devise a solution to the problem of nuclear waste storage and disposal have been inadequate, 42 U.S.C. §10131(a)(3), and that state and local participation in this planning and development of storage and disposal facilities "is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel," 42 U.S.C. §10131(a)(6). The future of nuclear technology as a means of power generation throughout the United States depends not only upon governmental decisions concerning the construction, operation and safety aspects of this controversial method of creating energy, but also upon the creation of proper storage and disposal techniques for the vast amount of resulting nuclear waste.

At the local level, the municipal governing body and the citizenry of Lacey Township have a concrete stake in the disposition of the issues involved in this case separate and more direct than that of the general public at large. The Township had placed its trust in the representations of JCP&L and federal officials at the outset by accepting nuclear technology in the community as permissible use of a large tract of land within its borders. Although it is conceded that many aspects of nuclear power generators are matters for federal control preempting local regulation, the Township is vitally concerned with each and every aspect of the industry upon which it may permissibly give input. Each decision concerning the Oyster Creek nuclear facility directly impacts upon the host municipality, and the degree to which the Township may exercise authority over the use of its lands devoted to the nuclear age is a subject of extreme importance not only to Lacey Township but to all municipalities hosting nuclear power facilities and those who may in the future consider hosting such facilities.

The national and local importance of nuclear waste issues and the division of responsibility between federal and local levels of government in this emerging field warrants the exercise of the

U.S. Supreme Court's discretion to review the decisions below.

B. The division of federal and local authority over land use regulations affecting the disposition of nuclear waste has not been decided by this Court.

Congress has legislatively made it abundantly clear that both federal and local levels of government are to exercise authority over the development of the nuclear industry in the United States, however, the division of federally exempted regulation has not clearly been delineated from those areas upon which local authority may permissibly be exercised. In enacting the Atomic Energy Act of 1954, 42 U.S.C. §2011 *et seq.*, which created the Atomic Energy Commission (now the Nuclear Regulatory Commission) to administer federal standards and safeguards over the development of the nuclear industry, Congress recognized the need for cooperation between federal and state governments to establish an orderly regulatory pattern between the two, 42 U.S.C. §2021(a). In promulgating the purpose of this federal legislation, Congress hastened to add that it was not its intent to usurp traditional local authority over the "non-nuclear" technological aspects of the nuclear industry. According to Congress, nothing in its delineated purposes for enacting the Atomic Energy Act was intended to affect "the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." 42 U.S.C. §2021(k). Again, in enacting the Nuclear Waste Policy Act, 42 U.S.C. §10101 *et seq.*, Congress reiterated that "State and public participation in the planning and development of nuclear waste repositories is essential to promote public confidence in the safety of disposal of such waste and spent fuel," 42 U.S.C. §10131(a)(b).

Although Congress has clearly and consistently indicated that both federal and local governments have a degree of control over the development of the nuclear industry and the policies behind the disposal of nuclear waste, the extent to which local land use regulations may limit a municipality's involvement in the nuclear industry has yet to be specifically addressed by this Court. The only decision of national precedent addressing the issue of local control over nuclear waste disposal supports the action taken by the petitioner herein. In *Pac. Gas. & Elec. v. St. Energy Resources Conser.*, 461 U.S. 190, 103 S. Ct. 1713 (1983), this Court found that a state may impose a moratorium on the certification of new

nuclear plants until such time as the state is satisfied that adequate technology has been developed for the permanent disposal of nuclear wastes. Although the *Pacific Gas* case involved an earlier stage of the storage and disposal problem, it represents this Court's sole statement of the proper allegation of federal and local authority over nuclear waste decision-making. In upholding the state law, the Court found that:

> "Congress has preserved the dual regulation of nuclear-powered electricity generation: the federal government maintains complete control of the safety and "nuclear" aspects of energy generation; the states exercise their traditional authority over the need for additional generating capacity, the type of generating facility to be licensed, land use, ratemaking, and the like." *Id.*, 103 S. Ct. at p. 1726.

The Township seeks to apply the logic of *Pacific Gas* to all stages of local concern over nuclear waste storage and disposal. Without regard to the technology or operational safety of nuclear storage and disposal methods, the Township should be permitted to resist JCP&L's attempt to import nuclear waste into is Oyster Creek facility for long term storage and disposal as a matter of traditional local land use regulation.

The important need for Supreme Court guidance on the applicability of the *Pacific Gas* division of federal and local authority to all stages of the development of the nuclear industry warrants the granting of certiorari in the instant case. This guidance is necessary not only for existing host municipalities, but also for communities which will consider hosting nuclear facilities in the future. Indeed, the future of local government and public support for nuclear energy development in the country will be affected by the degree of permissible local control reserved from federal preemption by this Court. Regardless of the position which the Court may take, the division of authority and degree to which local government may control the use of lands dedicated to nuclear operations should be clearly delineated by our nation's highest Court in order that all present and future host municipalities may properly assess the degree to which they may influence the course of development of the nuclear industry as it directly affects to land use within its borders.

C. The decision of the courts below are in conflict with the applicable decisions of this Court and other lower court opinions.

As indicated above, this Court has had only one occasion to render an opinion concerning the proper division of federal and local authority over nuclear power facilities. To the extent that this Court has addressed the subject issues at other stages of nuclear energy operations, it is respectfully submitted that the decisions of the courts below have failed to give effect to the legal precedent established by this Court, as well as the precedents established by various state courts across the country.

In *Pac. Gas. & Elec. v. St. Energy Resources Conser.*, 461 U.S. 190, 103 S. Ct. 1713 (1983), the U.S. Supreme Court reviewed the constitutionality of a California statute which provided that a state energy commission must determine that there will be adequate interim storage for spent nuclear fuel before any nuclear power plants could be built in the state. The California statute also imposed a moratorium on the certification of new nuclear plants until such time as the state commission finds that adequate technology has been developed for the permanent disposal of high-level nuclear wastes. Interested utility companies sought to invalidate the California statute under the Supremacy Clause based upon the asserted preemption of the Atomic Energy Act. The Court held that no federal preemption existed to invalidate California's legislation, finding congressional intent was

> "that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Id.*, 103 S. Ct. at p. 1723.

The Court specifically approved California's use of legislative decision-making to address nuclear waste disposal problems. *Id.*, 103 S. Ct. at p. 1728. It was careful to note, however, that California was not seeking to impose its own standards on nuclear waste disposal, and that the challenged legislation "accepts that it is the federal responsibility *to develop and license such technology.*" *Id.*, 103 S. Ct. at p. 1730 (emphasis added).

Similarly, in the instant case, the subject ordinances do not change federal regulations, nor do they regulate, prescribe or control the safety and nuclear aspects of energy generation, but rather they express and enact the local government's legitimate concern over the propriety of the use of municipal lands for nuclear waste storage, which would admittedly be preempted by federal construction and operation standards. The Township has, quite simply, exercised its traditional police power local authority to protect and preserve the welfare of its citizenry by legislatively avoiding any increased nuclear involvement within its borders above and beyond that necessary to continue federally-licensed nuclear power generation at Oyster Creek. As such, the Township's actions are wholly within the specifically designed areas of authority reserved for local legislative judgment by Congress.

State courts have also refused to find comprehensive federal preemption by the Atomic Energy Act. In *Northern California Ass'n. to Preserve Bodega Head and Harbor, Inc. v. Public Util. Com'n.*, 61 Cal 2d 126, 37 Cal. Rptr. 432, 390 P. 2d 200 (1964), the California Supreme Court held that the federal government had not preempted the question of the safety of the location of atomic reactors. Noting first that the stated purpose of the Atomic Energy Act, as amended in 1959, is to "recognize the interests of the states in the peaceful uses of atomic energy" and to increase state responsibility in the field, *Id.*, 390 P. 2d at p. 204 (42 U.S.C. §2021(a)), the court reasoned as follows:

> "Subdivision (k) of section 2021 reads: 'Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes *other than protection against radiation hazards.*'
>
> In view of subdivision (k) of section 2021, respondent (state) commission unquestionably has authority to inquire into safety questions apart from radiation hazards. Accordingly, since the location of an atomic reactor at or near an active earthquake fault zone involves safety considerations in addition to radiation hazards, *it is clear that the federal government has not preempted the field,* at least with respect to the phase of protecting the public from hazards and other than radiation hazards, and that *the states' powers in determining the location of atomic reactors are not limited to matters of zoning or similar local interests other than safety." Id.,* 390 P. 2d at p. 204 (emphasis added).

Although the court considered itself barred from considering the plaintiff's allegations concerning the workability of the nuclear operation, it held that it was not preempted from considering the allegations concerning nonradiological hazards from the plant, such as the creation and effect of steam, fog and ice from the operation. *Id.*, 390 P. 2d at P. 204. Again in *Marshall v. Consumers Power Co.*, 65 Mich. App. 237, 239 N.W. 2d 266 (Ct. App. 1975), a state court considered itself barred from considering the plaintiff's allegations concerning the workability of the nuclear operation yet held that it was not preempted from considering the allegations concerning nonradiological hazards from the plant, such as the creation and effect of steam, fog and ice from the operation.

Relying upon the intent and purpose of the Atomic Energy Act, the court concluded that:

> "Congress, thus, recognized the need for expertise and uniformity of regulation with regard to the handing of nuclear materials sufficient to form a critical mass, whose potential danger is clear. This potential danger and lack of expertise by state authorities required Federal preemption. Congress authorized the turnover to states of those less-hazardous aspects of nuclear power which state agencies might be trained to regulate. It also was careful not to impinge on state authority over nonradiological problems resulting from nuclear plant operation. Commentators have placed in this category such matters as site selection and zoning, local pollution, building and equipment codes on nonradiation machinery and working conditions of plant employees. All such concerns are intricately related to the construction and operation of nuclear plants, but all have historically, been left to the state regulation." *Id.*, 237 N.W. 2d at pp. 276-277.

Finally, in *State ex rel. Util Consumers Council v. Pub. Serv. Com.*, 562 S.W. 2d 688 (Mo. App. Ct., 1978), another state court reiterated that:

> "Herein lies the distinction in the present case. The federal government regulates *how* nuclear power plants will be constructed and maintained; the State of Missouri regulates *whether* they will be constructed. The federal

> regulations pertain to plans, specifications, safety mechanisms and the like. The Commission's considerations pertain to economic feasibility, need for increased power and financing. It is obvious that the considerations of the State of Missouri do not affect the control of *how* the nuclear facility will be constructed and physically maintained." *Id.*, 562 S.W. 2d at p.698.

Despite these expressions of separate and distinct federal and local ambits of authority, the courts below have failed to give meaning and effect to the legitmate local concerns of the Township herein. The effect of the decisions below is to usurp virtually all local control over any issues which develop at a nuclear power generating site. This was not the intent of Congress nor the intent of the Court in creating a dual regulatory scheme between the various levels of government. Therefore, review by this Court is warranted to correct and clarify conflicting decisions at the lower levels of our judicial system.

POINT II

THE [illegible]TS BELOW ERRED IN HOLDING THE TOWNSHIP'S NUCLEAR WASTE STORAGE ORDINANCE IS PREEMPTED BY THE FEDERAL ATOMIC ENERGY ACT BECAUSE THE ORDINANCE DOES NOT ENDEAVOR TO REGULATE THE SAFETY OF NUCLEAR STORAGE CONSTRUCTION OR OPERATIONS BUT RATHER IT MERELY IMPLEMENTS A PERMISSIBLE LOCAL LAND USE POLICY EXPRESSLY RESERVED TO THE STATES BY CONGRESS.

As indicated in Point I above, the lower court's finding of complete federal preemption in the field of nuclear waste storage and disposal is contrary to the express terms of the Atomic Energy Act, 42 U.S.C. §2011 *et seq.*, the Nuclear Waste Policy Act, 42 U.S.C. §10101 *et seq.*, the U.S. Supreme Court's decision in *Pac. Gas & Elec. v. St. Energy Resources Conser.*, 461 U.S. 190, 190 S. Ct. 1713 (1983), and various state court holdings on related issues. The purpose of the federal legislation in the field of nuclear energy is to provide national control over the construction and operation of nuclear power plants and the technology of nuclear energy generation. The subject ordinances do not infringe upon federal authority over the constructional and operational safety of Oyster Creek or any other nuclear facility, but rather it regulates the use of the plaintiff's land for the protection of the public good. The Township has not regulated the type or manner of safety precautions necessary for nuclear operations within the municipality. Nothing has been mentioned about any construction requirements or operational procedures. The Township has carefully steered clear of nuclear construction and operation regulations, since it has always been recognized that these areas are within the federal government's exclusive control. Nowhere in the law, however, is the municipality preempted from making a local legislative determination that an acceleration of nuclear waste storage within the Township is contrary to the general welfare of its inhabitants. The Township should be held to be free to make land use determinations as it deems to be in accordance with its best interest. To the very limited extent that Lacey Township has incidentally regulated the safety aspects of spent

fuel storage, its requirements are even more stringent than federal safety regulations for the protection of the public and are, thus, legislatively authorized by Congress. In short, the subject ordinances do not regulate the safety of nuclear storage construction or operations but rather merely implement a permissible local land use policy expressly reserved to the states of Congress. Therefore, there is no federal preemption by the Atomic Energy Act.

POINT III

THE COURT BELOW ERRED IN HOLDING THE TOWNSHIP'S NUCLEAR WASTE STORAGE ORDINANCE IS PREEMPTED BY THE FEDERAL HAZARDOUS MATERIALS TRANSPORTATION ACT BECAUSE THE ORDINANCE DOES NOT REGULATE THE SAFETY OF NUCLEAR TRANSPORTATION METHODS NOR THE ROUTES OF SUCH TRANSPORTATION BUT RATHER IT MERELY ENDEAVORS TO PREVENT OUTSIDE NUCLEAR WASTE FROM BEING INTRODUCED INTO THE MUNICIPALITY FOR LONG TERM STORAGE AND/OR DISPOSAL.

The lower court's holding that the federal Hazardous Materials Transportation Act, 49 U.S.C. §1801 *et seq.*, preempts Lacey Township's ordinance to the extent that it prohibits the importation of spent nuclear fuel for storage purposes misses the purpose and intent of the municipal governing body. The federal transportation act merely regulates the routing of hazardous material shipments and the safety aspects of its packaging for transportation. 49 U.S.C. §1804(a). The Act was enacted to expand federal authority to regulate shippers and carriers of hazardous materials, *U.S. v. Allied Chemical Corp.*, 431 F. Supp. 361 (D.N.Y. 1977), and the risk being addressed by Congress concerned those inherent in the *transportation* of hazardous materials, 49 U.S.C. §1801.

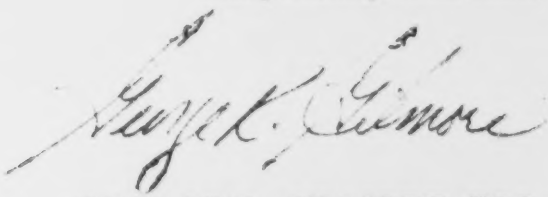
Lacey's ordinance, on the other hand, makes no attempt to route the transportation of spent nuclear fuel nor to regulate the safety of its transportation. Section One of the ordinance, prohibiting the importation of spent nuclear fuel for the purpose of storage within the Township, is part and parcel to the remainder of the ordinance (Section 2), which seeks to prevent outside nuclear waste from being stored within Lacey Township. The intent and effect of the ordinance is to prevent the expansion of the Oyster Creek storage facilities to include outside nuclear waste beyond that which is currently being generated by the operation. It is not the safety of nuclear transportation which is being regulated by the Township's ordinance, but rather it is the desireability of imported nuclear fuel wastes that has been legislatively determined by the

local governing body. The Hazardous Materials Transportation Act, therefore, does not apply to the instant case.

CONCLUSION

The issues involved in this case are of extreme national and local importance in the emerging field of nuclear energy generation. A national problem concerning the disposition of spent nuclear fuel has been created by private nuclear power operators. Although Congress has provided for dual federal and local regulation in the field, the proper division of federal and local authority over nuclear waste disposal has yet to be judicially determined by our nation's highest Court. It is submitted that the courts below incorrectly decided the case on motion for summary judgment. The subject ordinances are not preempted by the Atomic Energy Act nor the Hazardous Materials Transportation Act. Therefore, it is respectfully requested that this Court grant Lacey Township's petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit rendered in this case.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-5652 and 84-5763

JERSEY CENTRAL POWER & LIGHT COMPANY

vs.

TOWNSHIP OF LACEY
an incorporated village located in Ocean County,
State of New Jersey

TOWNSHIP OF LACEY, *Appellant*

(D.C. Civil No. 84-2995)

On Appeal from the United States District Court
for the District of New Jersey

Present: GIBBONS and HIGGINBOTHAM,
Circuit Judges, and

Circuit Judges, and
NEWCOMER, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for District of New Jersey and was argued by counsel April 30, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered September 27, 1984, and November 2, 1984, be, and the same are hereby affirmed. Costs taxed against appellants.

ATTEST:

Clerk

September 6, 1985

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*Honorable Clarence C. Newcomer, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Nos. 84-5652 and 84-5763
Page 2

Certified as a true copy and issued in lieu
of a formal mandate on September 30, 1985.

Test:

Chief Deputy Clerk, United States Court of Appeals
for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-5652 and 84-5763

JERSEY CENTRAL POWER
& LIGHT COMPANY

v.

TOWNSHIP OF LACEY,
an incorporated village located
in Ocean County,
State of New Jersey

TOWNSHIP OF LACEY,
Appellant

Appeal from the United States District
Court for the District of New Jersey
(D.C. Civ. No. 84-2995)

Argued: April 30, 1985

Before: GIBBONS and HIGGINBOTHAM,
Circuit Judges, and
NEWCOMER, *District Judge*•

(Filed September 6, 1985)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge:*

The transport and storage of "hazardous materials" has generated increasing concern over the unpredictable risks presented to the public, while at the same time, it is recognized that our modern society depends upon the transformation of atomic power into energy and the ready availability of these fissionable materials for industrial, commercial and consumer use. This mixed blessing of technological progress and enhanced public sensitivity to environmental issues has led to rigorous federal, state and local regulation in the nuclear energy field.

This appeal exemplifies the familiar clash between society's desire to reap the benefits of nuclear technology and society's understandable apprehension regarding the safety and environmental impact such usage entails. This appeal calls upon us to intrepret the preemptive features of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (1982), and the Hazardous

Materials Transportation Act, 49 U.S.C. §§ 1801-1812 (1982), as they impact upon local regulation of the transportation and storage of radioactive nuclear materials.

In this case, the district court declared unconstitutional, and therefore void and unenforceable, a township ordinance which prohibits the importation of "spent nuclear fuel or other radioactive waste for the purpose of storage" within the locality, as inconsistent with the aforementioned federal statutes. The locality appeals from the issuance of a permanent injunction precluding governmental interference with a six-month campaign of shipping radioactive nuclear waste into the locality for storage as well as from a declaratory judgment declaring the township's prohibitory ordinance invalid.

We will affirm the district court's grant of summary judgment in favor of the nuclear generating station which engaged in the shipping campaign because we find this locality's outright ban on the importation and storage of radioactive materials to be in conflict with federal law.

I.

A. *Background -- The NYSERDA Case*

Jersey Central Power and Light ("JCP&L") is a public utility incorporated under the laws of the State of New Jersey and is the owner of the Oyster Creek Nuclear Generating Station ("Oyster Creek"), located in Lacey Township, New Jersey. Oyster Creek is a nuclear power plant and a federally licensed "utilization facility" as defined by the Atomic Energy Act of 1954. ("AEA"), 42 U.S.C. § 2014(cc).[1] As such, it is

1. The term "utilization facility" means (1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the

authorized to generate nuclear energy and also to receive and store on-site "special nuclear material", a classification which encompasses spent nuclear fuel ("spent fuel"). 42 U.S.C. § 2014(aa).

The fuel for nuclear electric power reactors -- uranium enriched in the isotope 233 or 235 -- becomes depleted after a few years in the reactor and has to be replaced. Spent fuel is intensely radioactive and its radioactivity is very long-lived, therefore it constitutes "hazardous materials" as defined in the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. § 1802(2).[2] The question of what to do with it is a troublesome one; nuclear waste must be quite carefully stored.

The general practice is now to store spent fuel in a water-filled pool at the reactor site. In the late 1960's and early 1970's, it was assumed by the nuclear industry that this spent fuel would be reprocessed so as to recover and recycle the remaining fissionable products. Accordingly, the storage pools at reactor sites were designed as short-term holding facilities. Thus, in 1975, Nuclear Fuel Services contracted to supply reprocessing services to JCP&L for spent fuel that was generated at Oyster Creek and to store that

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common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission. 42 U.S.C. § 2014(cc).

2. "[H]azardous material" means a substance or material in a quantity and form which may pose an unreasonable risk to health and safety or property when transported in commerce. 49 U.S.C. § 1802(2).

fuel at the Western New York Nuclear Service Center. This facility is owned by the New York State Energy Research and Development Authority ("NYSERDA"), and is located in West Valley, New York. Pursuant to this contractual arrangement, JCP&L transported 224 of its 980 spent fuel assemblies from its Oyster Creek nuclear plant to West Valley, New York. In September of 1976, however, Nuclear Fuel Services withdrew from the reprocessing business and the 224 spent fuel assemblies were never reprocessed. They simply remained in the West Valley storage pool.

Due to a dispute between NYSERDA and JCP&L and certain other public utilities storing fuel at the West Valley facility, NYSERDA commenced an action in the United States District Court for the Western District of New York entitled *New York State Energy Research and Development Authority v. Nuclear Fuel Services, Inc.*, Civ. No. 82-426 (W.D.N.Y.)("the NYSERDA case"). NYSERDA alleged liability for removal of the spent fuel stored at the disposal and reprocessing center and for pecuniary compensation upon theories of trespass, breach of contract and unjust enrichment. The district court ruled that JCP&L would be a trespasser if NYSERDA's unequivocal demand for removal was made and ignored. *New York State Energy Research and Development Authority v. Nuclear Fuel Services, Inc.*, 561 F. Supp. 954 (W.D.N.Y. 1983).

Subsequently, NYSERDA made an unequivocal demand for removal of JCP&L's spent fuel. On September 30, 1983 NYSERDA and JCP&L entered into a partial settlement agreement which was later incorporated into the district court's October 14, 1983 order directing JCP&L to commence the removal of its 224 spent fuel assemblies from West Valley by October

1, 1984 and complete removal by May 31, 1985.[3] The transportation of these 224 spent fuel assemblies from West Valley, New York to the Oyster Creek facility spawned additional proceedings in the United States District Court for the District of New Jersey.[4] Its storage, understandably, underlies this appeal.[5]

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3. The United States District Court for the Western District of New York ordered the removal of JCP&L's spent fuel from West Valley in connection with the implementation by the United States Department of Energy of the West Valley Demonstration Project Act, P.L. 96-368, 92 Stat. 1347 (1980), which is designed to develop solutions to the nation's severe nuclear waste disposal problem.

The United States Department of Energy has taken possession of the West Valley facility for a demonstration project involving the preparation of radioactive waste for disposal. NYSERDA remains the owner. The West Valley Demonstration Project is intended to develop and demonstrate solidification techniques which can be used to prepare high-level radioactive waste for disposal in accordance with the policy objectives of the Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101-10226 (1982). The continued storage of the spent fuel assemblies at the West Valley facility impacted on the implementation of the West Valley Demonstration Project because completion of the project assumes removal of all spent fuel from the storage pool.

4. The transportation of the spent fuel at issue here has generated two related cases: Jersey Central Power & Light Company v. State of New Jersey and Irwin I. Kimmelman, as Attorney General of the State of New Jersey, No. 84-5883 ("The State Action"), and New Jersey Turnpike Authority v. Jersey Central Power & Light Company, et. al., No. 85-5003, ("The NJTA Action").

5. The Supreme Court recently noted that the storage of nuclear waste has taken on special urgency in this nation. "Some 8,000 metric tons of spent nuclear fuel have already accumulated, and it is projected that by the year 2000 there will be some 72,000 metric tons of spent fuel. Government

B. *Jersey Central Power and Light Co. v. Township of Lacey, Nos. 84-5652 and 84-5763* ("The Township of Lacey Action")

On August 25, 1983, during the pendency of the New York federal action, the Township of Lacey, an unincorporated village located in Ocean County, New Jersey, enacted into law the "Spent Fuel Ordinance" in question here.[6] This ordinance prohibits the

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studies indicate that a number of reactors could be forced to shut down in the near future due to the inability to store spent fuel." Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 195 (1983) (citing Office of Technology Assessment, Managing Commercial High-Level Waste, 9 (April 1982); H. Rep. No. 785, part 1, 97th Cong., 2d Sess. (1982) 47).

6. The Township of Lacey's Spent Fuel Ordinance, No. 24-83, reads as follows:

ORDINANCE OF THE TOWNSHIP OF LACEY, COUNTY OF OCEAN STATE OF NEW JERSEY, PROHIBITING THE IMPORTATION OF SPENT NUCLEAR FUEL OR RADIOACTIVE WASTE FOR STORAGE WITHIN THE TOWNSHIP OF LACEY, AND REGULATING THE STORAGE OF SPENT NUCLEAR FUEL AND OR RADIOACTIVE WASTE AT THE OYSTER CREEK NUCLEAR POWER PLANT WITHIN THE TOWNSHIP OF LACEY

BE IT ORDAINED by the Township Committee of the Township of Lacey, County of Ocean, State of New Jersey, as follows:

SECTION 1. No persons shall import, transport, or bring into the Township of Lacey any spent nuclear fuel or other radioactive waste for the purpose of storing the same within the Township of Lacey.

SECTION 2. No spent nuclear fuel or other radioactive waste, other than that generated at the Oyster Creek Nuclear Power Plant located within the Township of Lacey, shall be held for storage within the Township of Lacey. In regard to

importation of any spent nuclear fuel or other radioactive waste for the purpose of storing the same within the Township of Lacey.

JCP&L wanted to return the 224 spent fuel assemblies stored at the West Valley facility to Oyster Creek's storage facility since, according to JCP&L, the Oyster Creek facility was the only viable alternative storage facility. Because it was prevented from doing so by the Spent Fuel Ordinance, JCP&L filed a complaint against the Township of Lacey seeking a declaration that the ordinance was invalid and unenforceable because it violated the Constitution and statutes of the United States. In addition, JCP&L sought an order enjoining enforcement of the ordinance as well as other relief, including damages.

Subsequent to the Township of Lacey's Answer, JCP&L moved for summary judgment pursuant to Fed.

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the Oyster Creek Nuclear Power Plant, no spent nuclear fuel or radioactive waste produced by that plant, which has been removed from the Township of Lacey, shall be brought back into the Township of Lacey for the purpose of storing the same on a temporary or permanent basis.

SECTION 3. Nothing in this ordinance shall be construed to prohibit the transportation of spent nuclear fuel or radioactive waste through the Township of Lacey as authorized and sanctioned by the Federal Government and State of New Jersey.

SECTION 4. All ordinances or parts of ordinances inconsistent herewith are hereby repealed.

SECTION 5. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by a Court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

SECTION 6. This ordinance shall take effect after second reading and publication as required by law."

R. Civ. P. 56 on its claims that the ordinance was unconstitutional and invalid because it was preempted by the AEA, the HMTA and violated the Commerce Clause, U.S. Const. art. I, § 8. The motion did not encompass the damages issues but sought only declaratory and injunctive relief.

After hearing argument on the motion, Judge Bissell issued a ruling from the bench on September 24, 1984, granting JCP&L's motion for summary judgment. He ruled that there was no dispute as to any issue of material fact and that the Spent Fuel Ordinance was, as a matter of law, unconstitutional under both the Supremacy Clause, U.S. Const. art. VI, § 2, and the Commerce Clause. The district court declared the ordinance unconstitutional and therefore void and unenforceable and permanently enjoined the Township from its enforcement. The district court also denied the Township's motion for a stay pending appeal. On September 27, 1984, the Township noticed appeal.

The Lacey Township Committee then amended the August 25, 1983 ordinance on October 24, 1984 to impose criminal penalties on any person or entity returning spent fuel to Lacey Township.[7] On October

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7. The Penalty Ordinance, No. 56-84, reads as follows:

AN ORDINANCE OF THE TOWNSHIP OF LACEY, COUNTY OF OCEAN, STATE OF NEW JERSEY, AMENDING AND SUPPLEMENTING CHAPTER 85 OF THE TOWNSHIP CODE OF THE TOWNSHIP OF LACEY, ENTITLED "RADIOACTIVE WASTE," SO AS TO PROVIDE FOR PENALTIES [SIC] PROVISIONS FOR THE VIOLATION THEREOF

BE IT ORDAINED by the Township Committee of the Township of Lacey, County of Ocean, State of New Jersey, as follows:

26, 1984, JCP&L filed a Notice of Motion for Enforcement of Judgment and Other Relief in which it sought to have declared invalid the amendatory Penalty Ordinance. Judge Bissell granted the motion, declared the Penalty Ordinance unconstitutional and further enjoined the Township of Lacey from enforcing the August 25, 1983 Spent Fuel Ordinance as amended. The Township again noticed appeal and its two appeals were consolidated by order of this Court on November 29, 1984.

II.

Initially, we must address the question whether this case is now moot, inasmuch as the controversial shipping campaign of spent nuclear fuel concluded on July 9, 1985 and the 224 spent fuel assemblies are presently being stored at the Oyster Creek nuclear

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SECTION 1. Chapter 85 of the Township Code of the Township of Lacey, entitled "Radioactive Waste," is hereby amended and supplemented as follows:

§ 85-4. Violations and penalties.

Any person violating any of the provisions of this article shall, upon conviction, be punishable by a fine not exceeding one thousand dollars ($1,000.) or by imprisonment not exceeding ninety (90) days, or both.

SECTION 2. All ordinances or parts of ordinances inconsistent herewith are hereby repealed.

SECTION 3. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by a Court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

SECTION 4. This ordinance shall take effect after second reading and publication by law.

facility.[8] We must consider whether the cessation of the challenged activity by the plaintiff JCP&L renders this case moot or any of the individual claims raised herein.

A case becomes moot if (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Galda v. Bloustein*, 686 F.2d 159, 162-63 (3d Cir. 1982); *Finberg v. Sullivan*, 658 F.2d 93, 97-98 (3d Cir. 1980)(in banc).

A question is moot when it no longer presents a live controversy or if the parties lack a cognizable interest in the outcome. *North Carolina v. Rice*, 404 U.S. 244 (1971). If a defendant has discontinued the challenged activities a case is moot if there is no reasonable expectation that the wrong will be repeated. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *Hudson v. Robinson*, 678 F.2d 462, 465 (3d Cir. 1982). Underlying these principles, is the fact that there is no effectual relief that can be afforded by the court should

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8. This court was so advised by letter briefs filed after oral argument in response to the court's inquiry as to whether the spent fuel shipments had occurred and if so, whether this matter was rendered moot. As mootness is a jurisdictional question, we may consider it *sua sponte*. *See* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U..S 531, 537 (1978); Memphis Light Gas & Water Div. v. Craft, 436 U.S. 1, 7-8 (1978); C&C Products, Inc. v. Messick, 700 F.2d 635, 636 (11th Cir. 1983).

See also our discussion of mootness in the related cases: Jersey Central Power & Light Company v. State of New Jersey and Irwin I. Kimmelman, as Attorney General of the State of New Jersey, No. 84-5883, and New Jersey Turnpike Authority v. Jersey Central Power & Light Company, et al., No. 85-5003.

it decide the case in favor of the plaintiff. *Mills v. Green*, 159 U.S. 651, 653 (1895).

We believe that the issues presented are still live and the parties have some cognizable interest in the outcome. The lawsuit between JCP&L and the Township of Lacey has not been mooted by the delivery of the 224 spent fuel assemblies to Oyster Creek for two reasons. First, JCP&L requested an injunction precluding the enforcement of the Spent Fuel and Penalty Ordinances and the activity challenged by these provisions is JCP &L's importation *and* storage of the nuclear waste at Oyster Creek. Thus, the cessation of the plaintiff's shipping campaign does not eradicate the effects of the *continued* storage of the rods and the defendant's representations to enforce its ban. Were we to declare the Township's Spent Fuel Ordinance constitutional, the Township would then be entitled to a permanent injunction requiring the removal of the spent fuel rod assemblies because violation of its ordinance continues each day that the nuclear waste remains stored within the Township's borders.

Secondly, the Township's Penalty Ordinance provides for monetary penalties for each day of violation. The Township's Penalty Ordinance was declared unconstitutional in conjunction with the main regulatory ordinance and the Township was prohibited from its enforcement. Should this Court find that the district court erred in concluding that the ordinances violate constitutional standards and therefore abused its discretion in issuing the injunction, the Township would have the authority to impose appropriate fines. Therefore, the constitutionality of the challenged ordinances and the degree of local authority to be retained by municipalities with respect to the regulation of nuclear reactors within their midst, give rise to vital legal

issues of substantive merit despite the fact that JCP&L has completed its shipping campaign.

In short, the present litigation has retained its vitality as a "case or controversy" for Article III, U.S. Const. art. III, § 2, purposes -- this is not a case where the judgment rendered by our Court will have no practical effect upon the existing controversy. Judgment in favor of JCP&L would resolve the issue of the legality of its continued storage of these 224 rods and its criminal liability. Judgment in favor of the Township of Lacey could afford both legal and equitable remedies for the violation of its ordinances. We will therefore proceed to the merits of this case.

III.

In evaluating the propriety of the governmental regulations in this appeal, our standard of reviewing a grant or denial of summary judgment is plenary. A grant of summary judgment is appropriate only where it appears from the pleadings, depositions, admissions, answers to interrogatories, and affidavits, considered in the light most favorable to opposing parties, that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c); *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211, 218 (3d Cir. 1983), *cert. denied sub nom. Westinghouse Electric Corp. v. EEOC*, ___ U.S. ___, 105 S. Ct. 92 (1984); *Harrison v. Byrd*, 765 F.2d 501 (5th Cir. 1985).

We affirm the district court's grant of summary judgment invalidating the Township of Lacey's Spent Fuel and Penalty Ordinances because we find that (a) there are no genuine issues of material fact in dispute; (b) as a matter of law, the ordinances are preempted by the AEA and hence violative of the Supremacy Clause; and (c) as a matter of law, the ordinances are

preempted by the HMTA and, on this basis, are also contrary to the Supremacy Clause.[9]

A.

We agree with JCP&L's contention that the facts alleged by the Township to be in issue are neither material nor essential to a determination that the ordinances are unconstitutional.

Lacey, on appeal, questions essentially only one of JCP&L's factual assertions: that Oyster Creek is the only viable spent fuel storage facility available to store JCP&L's 224 spent fuel assemblies, as asserted in paragraph 13 of the JCP&L's Affidavit, Appendix ("App.") at 64; Appellant's Brief at 12.

Whether or not there are actually other viable storage facilities, the determination of such fact is not germane to the issue of the constitutional legitimacy of this local entity's importation regulation. The mere existence of factual issues where those issues are not material to claims before this Court will not suffice to defeat a motion for summary judgment. *Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985). We are dealing with a fundamental conflict between the locality's interest in the exercise of its police power for public health and safety purposes and an established federal regulatory scheme. The questions posited are whether there has been federal preemption and whether the local regulation conflicts with federal law. A summary judgment order is not defeated merely because an issue of fact exists; the factual issue in dispute must be *material* to the resolution of the dispute. *Westinghouse Electric Corp.*,

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9. In light of our affirmance of the district court's disposition of this matter on the basis of the Supremacy Clause, we do not reach the constitutional issue of whether the ordinances unduly burden interstate commerce.

725 F.2d at 218. That is, it must be outcome determinative under the applicable law. *Big O Tire Dealers, Inc. v. Big O Warehouse*, 741 F.2d 160, 163 (7th Cir. 1984).

Even assuming, *arguendo*, that proof of the existence of viable storage sites other than Oyster Creek at which the spent fuel at issue could have been stored would constitute a material fact, the Township failed to set forth specific facts demonstrating, under Fed. R. Civ. P. 56(c), that there is a genuine issue for trial. Although the burden of proof rests initially with the party moving for summary judgment, when a motion is made and supported, the nonmoving party must produce specific facts showing that there is a genuine issue for trial, rather than resting upon the assertions of pleading; a genuine issue means that the evidence must create a fair doubt, and wholly speculative assertions will not suffice. *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). The Township of Lacey has failed to present any basis for its beliefs, other than its verified Answer and Memoranda of law below and to this Court. Legal memoranda and oral argument are not evidence and cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion. "Denials in the form of legal conclusions, unsupported by documentation of specific facts, are insufficient to create issues of material fact that would preclude summary judgment." *Securities and Exchange Commission v. Bonastia*, 614 F.2d 908, 914 (3d Cir. 1980).

In sum, the material facts relevant to this appeal are not in dispute. We turn now to the legal questions of whether the district court correctly held that the Ordinances are preempted by the AEA and the HMTA.

B.

Resolving this conflict between a local ban on the importation of nuclear waste and the federal interest in the civilian development of nuclear energy presents a constitutional inquiry with its roots in the Supremacy Clause, which elevates federal law above that of the states.[10] *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 92-93 (1824).

The Supremacy Clause mandates that federal law preempts any state regulation of any area over which Congress has expressly or impliedly exercised exclusive authority. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947). Thus, preemption may occur in a number of contexts. Congress may expressly indicate that the authority conferred by it is exclusive. This indication may be manifested by statutory lanaguage, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), or by the legislative history. Preemption may also arise from an actual conflict between federal and state regulations where compliance with both is a "physical impossibility", *Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or state law may impede the "execution of the full purposes and

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10. Article VI, Section 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.

The supremacy of federal law is counterbalanced by the Tenth Amendment which reserves to the states those powers not specifically consigned to the federal government or specifically forbidden to the states. U.S. Const. amend. X.

objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Where there has been neither an express intention by Congress to preempt a subject matter nor an inevitable federal-state conflict, the federal scheme may nonetheless imply preemption. The scheme of federal regulation may be "so pervasive as to make reasonable the inference that Congress left no room to supplement it. . ." *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 204 (1983)(quoting *Fidelity Federal Savings & Loan Assn v. De la Cuesta*, 458 U.S. 141, 153 (1982)).

The comprehensive federal regulatory structure controlling highway transportation and storage of radioactive materials primarily involves two agencies, the Nuclear Regulatory Commission ("NRC") and the Department of Transportation ("DOT"). *See generally* Trosten, *Federal-State-Local Relationships in Transporting Radioactive Materials: Rules of the Nuclear Road*, 68 Ky. L.J. 251 (1979-80). We will examine the scope of the federal statutes and regulations these agencies enforce as well as the preemptive features of each statutory scheme as it pertains to the local legislation in issue.

Regulation of Transportation and Storage by NRC - The Scope of the Atomic Energy Act

Following the demonstration of the first nuclear reactor in 1942, the test of the atomic bomb in 1945, and its effective military use shortly thereafter during the final stages of World War II, it became readily apparent that legislation was needed to control such a dangerous source of energy. Congress' response was the Atomic Energy Act of 1946, former 42 U.S.C. §§ 1801-1819, which established the Atomic Energy Commission ("AEC"), the precursor to the NRC, and

gave it expansive powers and control with respect to fissionable materials.[11] During these early stages of the development of nuclear technology the regulation and control of nuclear power resided exclusively in the hands of the federal government.

The Atomic Energy Act of 1954 was enacted to bring the original act of 1946 into accord with progress in the field of "atomic energy."[12] *See* H. R. Rep. No. 2181, 83d Cong., 2d Sess. 1-11 (1954). Justice White, speaking for the Supreme Court in *Pacific Gas*, described the amended federal regulatory structure as the federal government's relaxation of its monopoly over fissionable materials. "[I]n its place, [it] erected a complex scheme to promote the civilian development of nuclear energy, while seeking to safeguard the public and the environment. . ." 461 U.S. at 194. It vested in the AEC, now the NRC, exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possesion and use of nuclear materials when used for civilian purposes, whether or not they are part of interstate commerce. 42 U.S.C. §§ 2014, 2061-64, 2071, 2078, 2091-99, 2111-14. This jurisdiction includes, thus, the authority to regulate the shipment and storage of radioactive materials. Upon these subjects, no role was left for the states.

In 1959 Congress amended the Atomic Energy Act by adding 42 U.S.C. § 2021 (a)(1), specifically

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11. The Atomic Energy Commission was abolished by the Energy Reorganization Act of 1974, 42 U.S.C. § 5801-5879, which created the Nuclear Regulatory Commission. This in no way changed the scope of federal regulatory power, however.

12. The term "atomic energy" means all forms of energy released in the course of nuclear fission or nuclear transformation.
42 U.S.C. § 2014(c).

addressing the issue of cooperation between the federal and state government and delineating the limited instances in which state regulation of nuclear materials was proper. Congress intended section 2021 to confirm a general federal preemption of the regulation of nuclear activities. The purpose of section 2021 is to provide a framework within which, pursuant to an agreement with the NRC, states may assume the regulation of areas occupied by the NRC.[13] Most important for present purposes, state regulation of the construction and operation of any production or utilization facility is not permitted in a section 2021 agreement.

Since the addition of section 2021 to the Act in 1959, the NRC has promulgated regulations concerning exemptions from state jurisdiction and continued federal regulatory authority in agreement states. Those regulations provide that persons in agreement states are not exempt from the NRC's licensing and regulatory authority with respect to, *inter alia*, "[t]he construction and operation of any production or utilization facility" and the "transfer, storage or disposal of radioactive waste matter resulting from the separation in a production facility of special nuclear material from unradiated nuclear reactor fuel." 10 C.F.R. Part 150, 15(a)(4).

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13. 42 U.S.C. § 2021(a) states that:

> The Commission shall retain authority and responsibility with respect to regulation of
> (1) The construction and operation of any production or utilization facility
> • • •
> (2) the disposal of such . . . byproduct, source or special nuclear material as the Commission determines . . . should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.

Furthermore, in *Pacific Gas* the Supreme Court stressed that "the federal government maintains complete control of the safety and 'nuclear' aspects of energy generation; the states exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, rate making, and the like." 461 U.S. at 212.

In *Pacific Gas*, utilities brought an action challenging a California statute which conditioned the construction of nuclear power plants on findings by the State Energy Resources Conservation and Development Commission that adequate storage facilities and means of disposal are available. The district court granted relief and the state appealed. The Ninth Circuit reversed in part. The Supreme Court held that in view of the "avowedly economic purpose" behind the disposal means requirement, the requirement was not preempted by federal law. 461 U.S. at 216. The Township argues that this is a case such as *Pacific Gas* because an "avowed *economic* purpose as the rationale for enacting" the ordinance puts it "outside the occupied field of nuclear safety regulation" and within the ambit of "the states' exercise of their traditional authority over land use. The avowed purpose of the Township ordinances, however, is to protect "the public good" based on "a local legislative determination that an acceleration of nuclear waste storage within the Township is contrary to the general welfare of its inhabitants."

Judge Bissell reasoned that the Township ordinances were preempted because they regulate the operation of the Oyster Creek nuclear plant and because they are predicated on safety concerns, thereby ignoring the division between federal and state authority created by the AEA. *See, e.g., County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52, 59-60 (2d Cir. 1984)(responsibility to regulate and

enforce the safety aspects of Nuclear energy power remains the sole province of the NRC's expertise.) We find his analysis cogent and thorough.

We further agree with his determination that this case is not materially distinguishable from cases in the other Circuits which have held that state laws prohibiting the importation and storage of nuclear waste violated the Supremacy Clause. *See, e.g., People of the State of Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), *cert. denied sub nom. Hatigan v. General Electric Co.*, 461 U.S. 913 (1983); *Washington State Building and Construction Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913, (1983). *See generally Annot.*, 82 A.L.R. 3d 751 (1978).

Inasmuch as Congress has specifically established this pervasive scheme of federal regulation established by the AEA and NRC regulations, and inasmuch as the legislative history of the AEA and the regulations implementing it estabish beyond dispute that it is congressional intent that federal law should regulate the radiological safety aspects of the nuclear power industry, including the storage and shipment of spent fuel, we find that the ordinances under our preview are unconstitutional.

For these reasons, therefore, we affirm the district court's holding that the ordinances are preempted by the AEA and thus are invalid under the Supremacy Clause.

C.

Though it may seem superfluous to consider whether the Spent Fuel Ordinance and Penalty Ordinance are also unconstitutional under the Supremacy Clause because they are preempted by the HMTA and the regulations promulgated thereunder, in the event review is granted and the Supreme Court

disagrees with our analysis of the AEA, we additionally consider the preemptive nature of the HMTA.

Regulation of Transportation and Storage by DOT - The Scope of the HMTA.

Congress enacted the HMTA in 1975 to replace a patchwork of sometimes conflicting state regulations concerning routing, packaging and radiological aspects of hazardous material transport with "a general pattern of uniform, national regulations." *New Hampshire Motor Transport Association v. Flynn*, 751 F.2d 43, 46 (1st Cir. 1984). The purpose was to draw the federal government's "now fragmented regulatory and enforcement power over the movement of hazardous materials in commerce into one consolidated and coordinated effort under the direction of the Secretary of Transportation." S. Rep. No. 1192, 93d Cong., 2d Sess. 1 (1974).

HMTA empowers the Secretary of Transportation "to protect the Nation adequately against the risks of life and property which are inherent in the transportation of hazardous materials in commerce." 49 U.S.C. § 1801. The Secretary is thereby authorized to promulgate regulations governing "any safety aspect of the transportation hazardous materials which the Secretary deems necessary or appropriate." 49 U.S.C. § 1804(a).

Acting pursuant to this grant of authority, the DOT has enacted a comprehensive body of regulations governing the transport of hazardous materials in commerce known as the Hazardous Materials Regulations, codified at 49 C.F.R. §§ 171-179, including a Final Rule entitled "Radioactive Materials; Routing and Driver Training Requirements," commonly known by its docket number, HM-164, 46 Fed. Reg. 5298 (1981), codified at 49 C.F.R. § 177.825 (1982), which governs the highway transportation of

radioactive materials. The ultimate basis for DOT's Final Rule is "that the public risks in transporting these materials by highways are too low to justify the unilateral imposition by local governments of bans and other severe restrictions on the highway mode of transportation." 46 Fed. Reg. at 5299. The constitutionality of HM-164 was upheld in *City of New York v. United States Department of Transportation*, 715 F.2d 732, 741 (2d Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1403 (1984).

Preemptive Nature of HMTA

Under section 1811(a), the HMTA regulations preempt "inconsistent" state and local regulations. 49 U.S.C. § 1811(a). Congress included this provision "to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." S. Rep. No. 1192, 93d Cong., 2d Sess. 37 (1974).

A state or local law is "inconsistent" with federal requirements under the HMTA when it is not possible to comply with both, or where state requirements are an obstacle to an execution of federal law. 49 C.F.R. §§ 107.209(c)(1), (2). The DOT included a policy statement in an appendix to Part 177 of HM-164 ("Appendix A") to assist states and localities in promulgating highway "routing rules"[14] that are not inconsistent with HM-164. A "local routing rule" that applies to a large quantity of radioactive materials is

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14. The Appendix states, in relevant part:

> "Routing rule" means any action which effectively redirects or otherwise significantly restricts or delays the movement by public highway of motor vehicles containing hazardous materials, and which applies because of the hazardous nature of the cargo.

inconsistent with the HMTA if "it prohibits or otherwise affects transportation on routes or at locations" authorized by Part 177 of HM-164.

Under this interpretive policy, the Township of Lacey Spent Fuel Ordinance is an inconsistent "routing rule" because it effectively restricts or delays movement by public highway of motor vehicles containing hazardous materials. The district court found that the Spent Fuel Ordinance on its face affects transportation of large-quantity radioactive materials in its literal language and by natural implication and application. The district court further found that DOT regulations contemplate and permit the transportation of nuclear fuel into and out of the Oyster Creek facility. We endorse the district court's conclusion that the ordinance is an inconsistent local regulation under 42 U.S.C. § 1811(a) and, as such, is preempted by the HMTA.

IV.

Accordingly, we affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
AT TRENTON

JERSEY CENTRAL POWER & LIGHT CO., *Plaintiff*

against

TOWNSHIP OF LACEY, *Defendant*

Civil No. 84-2995 (JWB)

September 24, 1984

DECISION OF THE COURT

THE COURT: This case arises out of a complaint for a declaratory judgment, injunctive and other relief filed on or about July 23, 1984 by Jersey Central Power & Light Company, (hereinafter JCP&L) seeking a declaration that Ordinance Number 24-83, enacted on August 25, 1983 ("the Ordinance") by the Township of Lacey ("Lacey"), an unincorporated village located in Ocean County, New Jersey, is invalid and unenforceable because it violates the Constitution and statutes of the United States. In addition, JCP&L seeks an order enjoining enforcement of the Ordinance as well as other relief including damages. Jurisdiction is conferred by 28 U.S.C. Section 2201, 1331(a), and 1337.

This matter is presently before the court upon the motion of JCP&L for summary judgment under Federal Rule of Civil Procedure 56. I might add that no damages issues are encompassed within the present motion. The summary judgment aspect here is for the relief sought by way of declaratory judgment and injunction from the court against enforcement of the Ordinance against JCP&L. The court disagrees with Lacey that there are genuine issues of material fact in this matter. Indeed, the underlying facts are in many respects matters of public record and in any event not disputed to any material degree.

JCP&L is a corporation incorporated under the laws of the State of New Jersey, having its principal place of business in Morristown. JCP&L's wholly owned Oyster Creek Nuclear Generating Station (hereinafter referred to occasionally as "Oyster Creek"), located within Lacey, is a nuclear power plant and a federally licensed utilization

facility as defined by the United States Atomic Energy Act ("AEA"), 42 U.S.C. Section 2014 (cc). Oyster Creek is licensed by the Federal Nuclear Regulatory Commission, ("NRC"), to receive and store special nuclear material, a classification which encompasses the spent fuel which is the subject of the present case.

JCP&L owns and is currently storing 224 spent fuel assemblies at the Western New York Nuclear Service Center ("the Center") in West Valley, New York. All 224 spent fuel assemblies were originally generated at Oyster Creek and were removed to the center in 1975. The spent fuel is uranium enriched in the isotape 235 and is therefore classified as special nuclear material under 42 U.S.C. SECTION 2014(a) of the AEA. As this spent fuel is radioactive, it also constitutes "hazardous materials," as defined in Section 1803 of the Hazardous Materials Transportation Act, 49 U.S.C. 1803.

The center is owned by the New York State Energy Research and Development Authority (hereinafter referred to occasionally as "the Authority"). Due to a dispute between the Authority and certain utilities storing fuel at the center, including JCP&L, over responsibility and obligation to remove the fuel, the Authority commenced an action in May 1982 in the United States District Court for the Western District of New York entitled *New York State Energy Research and Development Authority versus Nuclear Fuel Services, Inc., et al.*, docket number 82 Civ. 0426E (W.D.N.Y.) ("the NYSERDA case"). JCP&L, of course, was a party to that case.

I agree with Mr. Monahan that Lacey Township was not a party. However, both the facts and the law material to resolution of the dispute before me, turn in no way upon either the presence or absence of Lacey Township as a party in the New York action.

On August 25, 1983, during the pendency of that New York federal action the Township of Lacey enacted into law the Ordinance in question here. The Ordinance is not lengthy and I will take this occasion to read it.

It is entitled "Ordinance."

"An Ordinance of the Township of Lacey, County of Ocean, State of New Jersey, prohibiting the importation of spent nuclear fuel or radioactive waste for storage within the Township of Lacey, and regulating the storage of spent nuclear fuel and/or radioactive waste at the Oyster Creek Nuclear Power Plant within the Township of Lacey."

It states, "Be it ordained by the Township Committee of the Township of Lacey, County of Ocean, State of New Jersey, as follows:

"Section 1. No persons shall import, transport or bring into the

Township of Lacey any spent nuclear fuel or other radioactive waste for the purpose of storing the same within the Township of Lacey.

"Section 2. No spent nuclear fuel or other radioactive waste, other than that generated at the Oyster Creek Nuclear Power Plant located within the Township of Lacey shall be held for storage within the Township of Lacey. In regard to the Oyster Creek Nuclear Power Plant, no spent nuclear fuel or radioactive waste produced by that plant, which has been removed from the Township of Lacey, shall be brought back into the Township of Lacey for the purpose of storing the same on a temporary or permanent basis.

"Section 3. Nothing in this Ordinance shall be construed to prohibit the transportation of spent nuclear fuel or waste through the Township of Lacey as authorized and sanctioned by the Federal government and State of New Jersey.

"Section 4. All ordinances or parts of ordinances inconsistent herewith are hereby repealed."

Section 5 contains a rather customary severability clause which I won't quote at this time, and Section 6 declares that "this Ordinance shall take effect after second reading and publication, as required by law," which it did.

On or about September 30, 1983 the authority and JCP&L entered into a partial settlement agreement, stipulation and order, which received the imprimatur of the court as so ordered on October 14, 1983, by the Honorable John T. Elfvin, (U.S.D.J.W.D.N.Y.). The partial settlement agreement, stipulation and order obligates JCP&L to commence the removal of its 224 spent fuel rods from West Valley not later than October 1, 1984 and to complete that removal not later than May 31, 1985.

JCP&L wants to return the spent fuel rods to Oyster Creek's storage facilities but is prevented from doing so by the Ordinance. Since the enactment of the Ordinance, JCP&L has unsuccessfully attempted to convince the Township of Lacey, among other things, for rescission of the Ordinance. The parties have also been unsuccessful in negotiating settlement, I have been advised. It is uncontested that, should JCP&L attempt to transport the spent fuel rods into Lacey, Lacey would seek to enforce the Ordinance.

Plaintiff essentially contends that the Ordinance is unconstitutional because (1) it violates the supremacy clause, that is Article VI, Section 2 of the United States Constitution, as this area is pre-empted by the AEA, the Atomic Energy Act; (2) it violates the supremacy clause as it is pre-empted by the Hazard-

ous Materials Transportation Act, previously cited, 49 U.S.C., Section 1801 *et seq.;* and as a supplement to both of those statutes Mr. Hyland has mentioned today that the Nuclear Waste Policy Act of 1983, 42 U.S.C. Sec. 10101 *et seq.*, would also be thwarted and violated by enforcement of the Ordinance.

Finally, the plaintiff alleges that the present Ordinance violates the Commerce Clause of the United States Constitution as it unduly discriminates against interstate commerce.

Conversely, defendants assert that the case is not ripe for summary judgment because there are genuine issues of material fact in dispute. I have already determined that that is not the case. Defendant further contends that should I find that there are no genuine issues in dispute, the Ordinance has no constitutional infirmities because it is enacted within the appropriate confines of the retained police powers of Lacey Township, reserved to the States by the Tenth Amendment to the U.S. Constitution.

Article VI, Section 2, of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Of course, local legislation by way of Ordinance is as subject to the restrictions of the supremacy clause as would be a state statute. The Supreme Court of the United States has recently stated,

"It is well-established that within Constitutional limits Congress may preempt state authority by so stating in express terms. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525(1977). Absent explicit preemptive language, Congress' intent to supersede state law altogether may be found from a 'scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it,' 'because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character or obligations imposed by it may reveal the same purpose.' " Citations omitted. Continuing with the same quotation: "even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal

law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Once again, citations omitted, The quotation just quoted, recognizable to all of us, I am sure, comes from the recent case, *Pacific Gas and Electric Company v. The State Energy Resources Conservation and Development Commission,* 461 U.S. 190, 75 L. Ed. 2d 752, 765 (1983).

Plaintiff argues that under the AEA Congress expressly preempted the field of operation of nuclear power plants, and all safety aspects of nuclear power generation. As such, local or state laws, such as the Ordinance, which interfere with the operation of federally regulated nuclear facilities and the transportation of nuclear fuel are preempted by the AEA.

In passing the AEA, Congress "intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns." That latter excerpt is also a quote from the *Pacific Gas* case, 75 L. Ed. 2d at 765-766. The Supreme Court in *Pacific Gas* further noted the Nuclear Regulatory Commission have been given "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials." Citations omitted. "Upon those subjects, no role was left for the states." 75 L. Ed. 2d at 767. The NRC has also retained authority and responsibility over the regulation of "the disposal of such...byproduct, source, or special nuclear material as the Commission determines... should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the commission." 42 U.S.C. Section 2021(c). Pursuant to that authority the NRC has issued detailed regulations for the licensing of storage facilities - both on the reactor site and away from the reactor site - for spent nuclear fuel. See, 10 C.F.R. parts 50, 60, 72 and 150.

In the case at bar, the issue to be resolved is whether the Ordinance falls within the ambit the safety and nuclear aspect of energy generation, in which case it would be preempted, or whether it falls within the ambit "the states" exercise of their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use,

rate making, and the like," 75 L. Ed. 2d at 770, in which case it would not be preempted.

The issue of whether the AEA preempts regulation of the interstate transportation and storage of spent nuclear fuel is not a case of first impression in the federal court system. In *People of the State of Illinois versus General Electric Company* 683 F. 2d 206 (7th Cir. 1982), *cert. den.,* under the name *Hartigan v. General Electric Co.,* - U.S. - 103 S. Ct. 1891 (1983), General Electric, the owner of a storage facility located in Illinois and an out of state utility with a contract to store its waste at that facililty, instituted suit seeking a declaration that the Illinois Spent Fuel Act violated the supremacy and commerce clauses of the U.S. Constitution. The Illinois Spent Fuel Act provided:

"No person may dispose of, store, or accept any spent nuclear fuel which was used in any power generating facility located outside this state, or transport into this state for disposal or storage any spent nuclear fuel which was used in any power generating facility located outside this state."

In determining that the Spent Fuel Act was preempted by the AEA, the court relied on an analysis of the structure and legislative history of the AEA given in *Northern States Power Company v. Minnesota,* 447 F. 2d 1143 (8th Cir. 1971), affirmed without opinion at 405 U.S. 1035 (1972), in which it was stated:

"The nature of the subject matter regulated and the need for uniform controls in order to effectuate the objectives of Congress are additionally supportive of a finding of pre-emption. In enacting the Atomic Energy Act of 1954, Congress made specific findings concerning the development, use and control of atomic energy. Included in these findings are a number of statements to the effect that the processing and utilization of source, by-product and special nuclear material *must be regulated by the United States in the national interest* because of their affect upon interstate and foreign commerce and in order to provide for the common defense and security and to protect the health and safety of the public." That quotation from the Northern States case appears at 447 F. 2d at 1153.

Based upon that analysis of the AEA, the court concluded that the AEA "equally preempts state regulation of the storage and shipment for storage, interstate and intrastate alike, of spent nuclear fuel." 683 F. 2d at 215.

A similar result was reached in *Washington State Building*

and Construction Trades Council v. Spellman, 684 F. 2d 627 (9th Cir. 1982), in which certiorari was denied by the U.S. Supreme Court as noted at 103 S. Ct. 1891 (1983). *Washington State* involved a suit by the operator of a commercial low-level radioactive waste dump. Also involved in the case were the United States and seven other plaintiffs seeking a declaration that the State of Washington's initiative measure number 383 was unconstitutional, as the AEA and the Low-Level Radioactive Waste Policy Act of 1981 preempted state regulation. Initiative 383 prohibited the transportation and storage, within Washington, of radioactive waste produced outside the state.

After noting the parties concession that the regulation of high-level radioactive waste had been preempted by the federal government and therefore that area was not susceptible to state regulation, the Ninth Circuit went on to rule that regulation of low-level radioactive waste had also been preempted. As the court stated, "(t)he regulation of the disposal of low-level radioactive waste is a legitimate federal activity and Congress has not waived or delegated its authority over the subject." *Id.* at 630.

A review of the case law and of the record before the Court clearly indicates that Lacey's attempt to regulate the shipment of nuclear fuel is an unconstitutional infringement of the supremacy clause, because this area of nuclear energy has been preempted by the federal government. The Supreme Court has clearly indicated that while the AEA envisions dual regulation of nuclear energy, it is the federal government which maintains complete control of the safety and "nuclear" aspects of energy production. This Court can think of no other aspect of nuclear energy which would be more "nuclear" than radioactive spent fuel rods and the manner in which they must be stored in order to insure the safety of the public to the fullest possible extent.

I might add that Mr. Monahan's arguments before me today that there are or that discovery might demonstrate additional objectives and policies to be served by the Lacey Township Ordinance are unpersuasive. I can divine none. They are in my view not even arguably present.

Defendants' contention that Congress intended that the States retain the power to regulate the transportation of nuclear material under their police powers is not supported by prior case law or the legislative history of the AEA. That legislative history notes in part:

...the dangers of conflicting, overlapping, and inconsistent

standards in different jurisdictions, to the hindrance (sic) of industry and jeopardy of public safety...It is not intended to leave any room for the *exercise of dual or concurrent jurisdiction* by states to control radiation hazards by regulating by-product, source or special nuclear materials. That citation is to Senate Report Number 870, 86th Congress, First Session, reprinted in 1959 U.S. Code of Congressional and Administrative News 2872, 2879. (Emphasis added.)

Clearly, Congress intended that the regulation of spent nuclear fuel be regulated by the federal government. For the aforementioned reasons, the Ordinance cannot withstand scrutiny under the supremacy clause.

Plaintiff also seeks a declaration that the Ordinance is preempted by the Hazardous Materials Transportation Act ("HMTA"). Plaintiff contends that the HMTA grants to the Secretary of the United States Department of Transportation ("Secretary") the exclusive authority to regulate all aspects of the transportation of hazardous materials, such as spent fuel. Further, plaintiff argues that the HMTA explicitly preempts state or local legislation which regulates or interferes with any aspect of such transportation.

The Ordinance, of course, on its face would affect transportation, first in its literal language, but also by natural implication and application. While a literal word or two concerning transportation might be excised under the severability clause, the necessary impact of the Ordinance as a whole upon transportation cannot be so surgically removed.

Mr. Monahan has protested here that it is not indeed the Township of Lacey's intent to directly affect transportation as opposed to storage. Nevertheless, as I mentioned before, the Ordinance necessarily would so impact on transportation as to bring the considerationf of the question of preemption under the HMTA into play. 49 U.S.C. Section 1804 is the general authority conferred upon the Secretary of the Department of Transportation to enact regulations governing transportation of hazardous materials. More particularly, subpart A of that statute is incorporated herein by reference and will be transcribed in the opinion, if requested.

"(a) The Secretary may issue, in accordance with the provisions of Section 553 of Title 5 including an opportunity for informal oral presentation, regulatilons for the safe transportation in commerce of hazardous materials. Such regulations shall be

applicable to any person who transports, or causes to be transported or shipped, a hazardous material, or who manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is represented, marked, certified, or sold by such person for use in the transportation in commerce of certain hazardous materials. Such regulations may govern any safety aspect of the transportation of hazardous materials which the Secretary deems necessary or appropriate, including, but not limited to, the packing, repacking, handling, labeling, marking, placarding, and routing (other than with respect to pipelines) of hazardous materials and the manufacture, fabrication marking, maintenance, reconditioning, repairing or testing of a package or container which is represented, marker, certified or sold by such person for use in the transportation of certain hazardous materials."

In accordance with this grant of authority, the secretary of the Department of Transportation has promulgated numerous regulations concerning hazardous waste materials. See particularly 49 C.F.R. Parts 171-177. The HMTA interestingly provides further as follows, at 49 U.S.C. section 1811 (a) and (b):

"Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in any regulation issued under this chapter, is preempted." That, of course, is specific Congressional preemption of the field about which the *Pacific Gas* case spoke briefly in another content.

However, in part (b) it states: "Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is not preempted if, upon the application of an appropriate State agency, the Secretary determines, in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level to the of protection to the public than is afforded by the requirements of this chapter or of regulations issued under this chapter and (2) does not unreasonably burden commerce. Such requirement shall not be preempted to the extent specified in such determination by the Secretary for so long as such State or political subdivision thereof continues to administer and enforce effectively such requirement."

Congress included the preemption provisions "to preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." See *City of New York v. United States*

Department of Transportation, 715 F2. d 732 (2d Cir. 1983).

Clearly, the Ordinance is an inconsistent local regulation under 42 U.S.C. Section 1811(a), and, as such, is preempted by the HMTA. Lacey's contention that the Ordinance does not regulate the safety of nuclear fuel transportation nor the routes of transportation is unfounded. DOT regulations contemplate and permit the transportation of nuclear fuel into and out of the Oyster Creek plant. The Ordinance prohibits that transportation, not only expressly, but, by necessary application.

The HMTA provides for an administrative ruling, however, by the DOT, a non-preemption ruling, on whether state of local regulations conflict with federal standards in the field of hazardous materials transportation. Quoting from the *City of New York* case again at page 740:

"A local jurisdiction qualifies for a non-preemption ruling if it can demonstrate to the DOT that its local regulation "affords an equal or a greater level of protection to the public" than that of DOT's regulations and "does not unreasonably burden commerce." this non-preemption procedure was added to HMTA so that in "certain exceptional circumstances" DOT could limit the preemptive force of federal regulations "to secure more stringent regulations" by local authorities."

One might argue, of course, that the present regulation would fall within the bounds at least of being a more stringent state regulation. As I note in a subsequent Section of this opinion, it does present an impermissible burden upon interstate commerce.

Putting that argument completely aside, Lacey never applied for a non-preemption rule from the DOT. This court will not speculate as to whether it would have received one had one been requested. Under present circumstances, without a non-preemption ruling, the Ordinance violates the supremacy clause because it is preempted by the HMTA and DOT regulations thereunder.

Before passing to the commerce clause argument, I want to make reference here to two very recent cases in the preemption field so that the parties and any reviewing court will realize that I have become aware of them and made use of them. Both of these cases held there was no preemption involved under the circumstances. The first was *Bass River Associates v. The Mayor, Township Commissioner, Planning Board of Bass River Township and Bass River Township*. The recorded district court opinion in that matter appears in 573 F. Supp. at page 205. The Third Circuit's opinion has not yet officially been reported, that I

know, but bears docket number 83-5727, filed August 31, 1984.

In that case, quite rightly, in this Court's view, the Third Circuit Court of Appeals determined that the mere licensing of vessels which could ply the navigable waters, and additionally the federal legislation affecting water pollution control, did not preempt local regulation under the zoning power which would prohibit the floating home communities that Bass River chose to exclude from its docks. The Third Circuit in Judge Sloviter's opinion clearly sets forth appropriate reasoning as to why preemption did not apply in that case, and I think, as is readily discernible from reading that opinion, it is quite different, because, among other things, of no conflict and a clear indication that both federal and local regulation could serve their own peculiar interests and exist side by side.

Similarly, the recent decision of the New Jersey Supreme Court in *Exxon Corporation v. Robert Hunt, et al.*, decided September 19, 1984, has been considered by the Court. To be sure, I am not bound by the Supreme Court of New Jersey on issues of federal constitutional law. Nevertheless, they certainly are more than an informative source on the subject and entitled to considerable respect. That particular decision reaches the determination, as we may all be aware, that in that particular case five petroleum and chemical companies could be required to pay taxes both into the federal Superfund and to the New Jersey State Spill fund in order to accomplish the environmental objectives sought to be asserted by each of these statutes.

That opinion is very lengthy and deals with preemption in several respects, but I think one particular quote is informative for our purposes. It appears at page 16 of the slip opinion and reads as follows:

"Whereas plaintiffs contend that the language used in Section 114(c) of Superfund demonstrates an intent on the part of Congress to repose in the federal government exclusively the power to maintain a fund for the cleanup and removal of hazardous substances, it is clear from the surrounding provisions of Superfund and its legislative history that Congress actually envisioned a cooperative arrangement between the federal and state governments."

As noted already in the opinion in the present case, it is this Court's determination that such a cooperative arrangement was hardly envisioned with regard to the subject matter of the present lawsuit. Rather, there is both a necessary and an express

preemption of the field by Congress in the present matter.

In order that all issues presented to the Court today may be disposed of, I will turn my attention now finally to the argument raised by the plaintiff that the present Ordinance is an unconstitutional violation of the Commerce Clause of the U.S. Constitution. Plaintiff essentially contends that the Ordinance violates the Commerce Clause because it unduly burdens and discriminates against interstate commerce.

The broad purpose of the Commerce Clause was defined in *H. P. Hood & Sons Inc., v. Du Mond* appearing at 336 U.S. 525, 537-538 (1949). I quote:

"This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the court said in *Baldwin v. Seelig,* (citation omitted), "what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.' "

Even in the absence of pervasive federal legislation, the "Commerce Clause prevents the States from erecting barriers to the free flow of interstate commerce." *Raymond Motor Transportation, Inc. v. Rice,* 434 U.S. 429 (1978). However, and I quote again from another opinion:

"incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is affected by state legislation, a virtually *per se* rule of invalidity has been erected. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a state's borders. *City of Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1977).

A state statute may affect commerce without violating the Commerce Clause if the statute serves a legitimate state interest and is applied in a nondiscriminatory manner. *Raymond Motor Transportation, supra.* The criteria for determining whether the Commerce Clause has been violated are articulated in the Supreme Court decision of *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970). The tripartite Pike test asks whether the state law (1) regulates evenhandedly; (2) accomplishes a legitimate local purpose; and (3) has only an incidental effect on interstate commerce.

Quoting again from the *City of Philadelphia* case, "The crucial inquiry, therefore, must be directed to determining whether" in this case the Ordinance "is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." 437 U.S. at 624.

Plaintiff, relying on *City of Philadelphia,* contends here that "the Ordinance is merely an attempt by Lacey to isolate itself from the problem of radioactive waste storage by erecting a total barrier against the transportation of spent fuel into Lacey for storage," Plaintiff's Brief at p. 34, and as such is invalid, *per se.* In the *City of Philadelphia* case the court held, as I mentioned before, that one state may not "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Id.* at 628. In that case, an out of state user of a New Jersey landfill challenged a New Jersey statute prohibiting the importation of out of state waste. New Jersey statute's effect was to protect the health of the state's citizens while ignoring the nationwide problem of waste disposal.

The U.S. Supreme Court found that the statute "...blocks the importation of waste in an obvious effort to saddle those outside the state with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites. That legislative effort is clearly impermissible under the Commerce Clause of the Constitution." *Id.* at 629.

Clearly, the present case is controlled by the *City of Philadelphia* holding. Lacey has attempted to solve its nuclear waste problem by preventing any more nuclear waste from crossing its borders for storage. Where, as here, a state "overtly blocks the flow of interstate commerce at (the) state's borders," *Id.* at 624, or in this case at the municipality's borders, the state or local legislation on its face discriminates against interstate commerce on the basis of origin. Defendant's contention that the Ordinance does not discriminate against out of state commerce because Lacey has closed its borders to nuclear waste storage regardless of place of generation is unpersuasive. Lacey does discriminate between waste produced in Lacey hereafter and waste produced outside of Lacey and, as such, impermissibly infringes on interstate commerce.

Even if a *per se* finding of invalidity is not warranted, the Ordinance cannot meet the requirements of the *Pike* test and, therefore, it is not legislation which, although affecting commerce,

does not violate the Commerce Clause because it serves a legitimate state interest and is applied in a nondiscriminatory manner. The first requirement of the *Pike* test is that the Ordinance regulate evenhandedly. As discussed above, the Ordinance exempts nuclear waste generated within Lacey and remaining there while banning the transportation into its borders of nuclear waste either generated or in this case temporarily located outside of Lacey. "Such uneven treatment of in (Township) and out of (Township) parties fails the first part of the *Pike* test. *Washington State,* 684 F. 2d at 631.

While the Ordinance may be designed to accomplish a legitimate local public purpose, that is, reducing the amount of nuclear waste to be stored in the township, and thereby meets the second part of the *Pike* test, it fails the first part and additionally violates the third. This is so because the effect of this Ordinance on interstate commerce obviously is more than incidental. Lacey has completely banned the transportation of out of township nuclear material for storage within its borders. Furthermore, in Mr. Vincent's affidavit there is evidence, undisputed at this point, that Lacey's actions have or may well have an impact on the West Valley Demonstration Project, also a creature of federal statute, an undertaking of significant national importance. See Vincent affidavit, paragraph 14.

For reasons set forth at length above, this court determines that the Lacey Township Ordinance at issue here is unconstitutional. Accordingly, an order will be entered enjoining its enforcement hereafter.

Mr. Hyland, I trust a form of order was submitted with the papers. I will employ that and enter it promptly.

I will take a moment once again to indicate that the papers handed in on both sides were first rate. It is a pleasure to have you here. Court is in recess.

(Recess)

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ATTORNEYS FOR PLAINTIFF

JERSEY CENTRAL POWER & LIGHT COMPANY, *Plaintiff*

vs.

TOWNSHIP OF LACEY, an incorporated village located in Ocean County, State of New Jersey, *Defendant*

UNITED STATES DISTRICT COURT
OF NEW JERSEY
Honorable John W. Bissell
Civil Action No. 84-2995

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter being opened to the Court by Riker, Danzig, Scherer & Hyland (William Hyland, Esq., appearing), attorneys for plaintiff, Jersey Central Power & Light Company, upon application for an Order pursuant to Fed. R. Civ. P. 56 for the entry of Summary Judgment in favor of plaintiff and against defendant; upon proper notice to and in the presence of Gilmore & Monahan (Thomas E. Monahan, Esq., appearing), attorneys for defendant Township of Lacey and the Court having read and considered the pleadings, affidavits, exhibits and briefs filed in support of and in opposition to said Motion and having heard the arguments of counsel and considered the records on file in this cause, and it appearing that there are no genuine issues as to any material fact with respect to plaintiff's claims against defendant Township of Lacey, and that the plaintiff is entitled to judgment as a matter of law, and the Court having rendered an opinion, and for good cause:

IT IS, on this 24th day of September, 1984 ORDERED and ADJUDGED that:

1. Summary Judgment be and hereby is entered in favor of plaintiff and against defendant that the Ordinance enacted by defendant on August 25, 1983, captioned "An Ordinance of the Township of Lacey, County of Ocean, State of New Jersey, Prohibiting the Importation of Spent Nuclear Fuel or Radioactive Waste for Storage Within the Township of Lacey, and Regulating the Storage of Spent Nuclear Fuel or Radioactive Waste at the Oyster Creek Nuclear Power Plant Within the Township of Lacey" ("the Ordinance") is unconstitutional, and therefore void and unenforceable; and

2. Defendant and all of its agents, servants and representatives be and hereby are permanently enjoined and restrained from enforcing the Ordinance.

JOHN W. BISSELL, U.S.D.J.